EX PARTE OR LATE FILED

ORIGINAL

ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

MSTV

1776 Massachusetts Ave., NW
Suite 310
Washington, DC 20036

Tel (202) 861-0344
FAX (202) 861-0342

Margita E. White
President

March 9, 2000

RECEIVED

MAR 0 9 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Suite 8-B 204
Washington, DC 20554

Re: CS Docket No. 98-120

Dear Chairman Kennard:

Gary Shapiro's letter of March 8 makes two serious mistakes in responding to the MSTV/NAB/ALTV letter to you of February 22.

First, the Consumer Electronics Association's letter is apparently based on reading only the first paragraph of the seven-page February 22 letter – and a misreading at that. The February 22 letter did not seek delay in television station DTV build-out. There was not a single solitary word to that effect.

Instead, it addressed the failure of the cable industry (gatekeeper to 70% of American homes) to carry broadcasters' digital television signals. In doing so, the letter said no more than the venerable Congressional Budget Office said in its September 1999 report: "Cable carriage of such [digital] broadcasts is perhaps the most important factor affecting how quickly digital TV reaches the largest number of households," and "a strong must-carry requirement for cable systems to carry DTV signals . . . will be necessary to achieve the mandated market penetration level [for] the transition." The letter also noted the lamentable record of the receiver manufacturing industry in implementing the 8-VSB technology.

Second, CEA does the receiver industry a terrible disservice in trying to deflect criticism onto broadcasters. What is called for instead is an honest acknowledgment of first-generation shortcomings in the implementation of 8-VSB and a specific game plan, backed by a sense of commitment and urgency, for curing those shortcomings.

There is a saying that "if you have the facts on your side, argue the facts. If you have the law on your side, argue the law. And if you have neither, shout a lot." CEA's March 8 letter is no more than a lot of shouting.

We want to work with receiver and chip manufacturers and have often done so productively in the past and intend to continue to do so in the future. CEA's March 8 letter

should be set aside as an unfortunate and misguided diversion from this partnership. Instead, we should get on with the job of realizing the potential of the 8-VSB standard.

But, as we stated in our February 22 letter, this won't be sufficient. The cable industry and the Commission must perform their essential functions if the transition is to succeed.

Respectfully submitted,

Margita E. White

cc The Honorable Susan Ness
The Honorable Harold Furchtgott-Roth
The Honorable Michael K. Powell
The Honorable Gloria Tristani
Magalie Roman Salas, The Secretary, FCC
Deborah Lathen, Chief, FCC Cable Service Bureau
Roy Stewart, Chief, FCC Mass Media Bureau
Christopher Wright, FCC General Counsel
The Honorable Tom Bliley
The Honorable John Dingell
The Honorable Edward J. Markey
The Honorable W. J. "Billy" Tauzin
The Honorable John McCain
The Honorable Conrad Burns
The Honorable Ernest F. Hollings
Edward O. Fritts, President, NAB
James B. Hedlund, President, ALTV
Gary Shapiro, President, CEA

MSTV National Association of NAB BROADCASTERS altv

February 22, 2000

The Honorable William E. Kennard
Chairman
Federal Communications Commission
The Portals
445-12th Street, S.W.
Washington, D.C. 20054

Re: CS Docket No. 98-120

Dear Mr. Chairman:

In your speech of January 19, you identified the digital transition among the Commission's top-10 priorities for the year 2000. Yet a poll conducted at the NATPE Convention three weeks ago showed that 78% of broadcasters believe the transition should be delayed, notwithstanding that the broadcast industry is more than meeting the deadlines to build out DTV stations.

Three developments contribute to the broadcast industry's discouragement, which contrasts so sharply with your aspirations:

- Frustration with the cable and receiver industries' inability to reach agreement on interoperability issues after 18 months of big talk and little action, prompting the Commission at last to consider a rule making to deal with this issue.

- Dissatisfaction with receiver manufacturers' implementation of the 8-VSB standard and concerns over the standard, prompting the Commission to add this topic to those to be considered in its biennial review of digital transition issues.

- Exasperation over Commission delay on digital carriage issues that now extends into the 27th month after adoption of the DTV standard. The Commission missed its end-of-'99 target for issuing a decision, and it is reported to be considering a further notice of proposed rule making. Meanwhile, only two DTV stations, WCBS-TV in New York and KITV in Honolulu, of the 119 on the air covering 61.3% of the country, are being carried and in each case by a single cable system.

If you were a broadcaster focusing on those three developments, you, too, might respond to the NATPE questionnaire by favoring deferral. But deferral would be of little solace if you were LIN Broadcasting, for example, and had already built six new towers and begun operating seven DTV stations.

Three conclusions may be drawn from the present situation.

First, the public has a vital stake in the digital transition, and the Commission's foot-dragging with respect to the carriage issues jeopardizes the public's interest in its successful accomplishment.

Second, the Commission's credibility is at stake. A decade-long process involving all affected industries, Congress and the FCC should be coming to a successful close with the rapid roll-out of DTV receivers and services. Broadcasters are honoring their end of the bargain at an ultimate cost of some $17 billion, but other parties to the process are not doing their part. As faith in the process collapses, the transition is put in serious jeopardy. To restore the multi-industry commitment necessary to implement the transition, the Commission simply must prod these other industries forward. Urging them to resolve interoperability issues is not enough. Eight years ago Congress mandated Commission action on cable carriage rules when it directed the Commission to adapt its analog must-carry rules upon adopting a DTV standard. Congress did not give the Commission discretion to wait to adopt substantive rules until the transition was well advanced or even over, nor is it reasonable as a matter of public policy for the Commission to continue to seek comment on issues that have been well-ventilated at least since the issuance of the Fourth Further Notice of Proposed Rulemaking in 1995 (with little change in facts except for proof that cable would not voluntarily carry DTV stations once they came on the air and that cable would increase capacity faster than predicted).

Third, the Commission has accorded cable sacred cow status. The television industry is under strict, precise and detailed government mandates for the DTV transition. In contrast, the cable industry, possessed of monopoly power conferred on it by local franchises and the historic benefits of the government-imposed compulsory copyright regime, is immune from serious scrutiny. The FCC is moving only now, after years of unmet cable promises, toward compatibility regulation. In addition, cable is expanding, horizontally through clustering and buy-outs, and vertically through program deals and equity participation. Yet it remains the unchallenged (by the FCC) gatekeeper to 70% of American homes, even though its high-income subscribers are where digital must make its most substantial penetration if the transition is to succeed.

The enclosure to this letter lists and responds to ten often-heard cable industry arguments against digital cable carriage requirements. They fail to provide any basis for the Commission's continuing refusal to carry out the mandate of the 1992 Act and enact digital carriage rules.

The Commission's inaction in the cable carriage proceeding threatens the transition and runs absolutely counter to your stated priorities. Because of this looming threat, we ask that you expedite this long stalled proceeding. We also ask that you meet with the three of us as soon as your schedule permits in order to further this goal.

Respectfully submitted,

Margita E. White
President
MSTV

Edward O. Fritts
President
NAB

James B. Hedlund
President
ALTV

cc: Honorable Susan Ness
Honorable Harold Furchtgott-Roth
Honorable Michael K. Powell
Honorable Gloria Tristani
Deborah Lathen, Chief, FCC/CSB
Roy Stewart, Chief, FCC/MMB
Christopher Wright, FCC General Counsel
Honorable Tom Bliley
Honorable John D. Dingell
Honorable Edward J. Markey
Honorable W.J. "Billy" Tauzin
Honorable John McCain
Honorable Conrad Burns
Honorable Ernest F. Hollings

February 22, 2000

CABLE'S RESPONSES TO TEN ARGUMENTS FOR DEFYING CONGRESS AND BLOCKING DIGITAL CARRIAGE REQUIREMENTS

1. Digital carriage arrangements can and should be worked out in the marketplace.

- The broadcasting/cable landscape is structured by government regulation, and the Supreme Court, Congress and the FCC have all found this to be appropriate and in the public interest.

- Nor is cable retransmission of broadcast signals a free-market enterprise. It is a transmission subsidized by the compulsory copyright license historically complemented by must carry regulations.

- The FCC, Congress and the courts have found that cable systems have both bottleneck power and incentives to injure the public's local broadcasting service (and the history of doing so), and that is why Congress directed the FCC to adapt the existing analog carriage rules to the digital environment. Cable consolidation and clustering have given MSOs an even stronger hand in distorting the market and thwarting broadcasters' efforts to reach cable subscribers with their digital signals.

- The DTV transition is not marketplace-driven. It is a joint government/industry effort to introduce new television technology for the benefit of the public, the future of universal television service, and the efficient use of spectrum.

2. The agreements between some MSOs and some of the networks show that private negotiations will settle the carriage issues.

- The experience of MSO/broadcasting negotiations are a reason to follow through with Congress' mandate, not defy it by endless foot-dragging. Aside from a carriage deal in Honolulu, only two cable operators, both with need of government approval for gargantuan deals, have entered into agreements with some of the networks, and yet only two systems in the country are carrying a DTV station (out of 119 on the air).

- There is only one station not owned by a network that has even been able to engage in serious discussions with a cable system about carriage (not for lack of trying), and stations supposedly entitled to piggy-back on a network deal have been denied carriage.

- In the early 1990's, the cable industry argued that the marketplace showed that analog must-carry rules were unnecessary because over 90% of broadcast stations were being carried. Today it argues that the marketplace shows that digital must-carry rules are unnecessary even though fewer than 1% of DTV stations are being carried.

3. **Because broadcasters don't have business plans for use of their digital channels, cable systems should not have to carry broadcasters' digital signals.**

   - It is not permissible for the Commission to regulate or not regulate based on content.

   - The 1992 Act's rationale for must carry is not about cable's programming or business plan preferences. Furthermore, broadcasters' business plans have no bearing on the amount of spectrum cable would have to devote to must carry.

   - The 1996 Act found it is in the public interest for broadcasters to experiment with their digital capacity; for the FCC to now press broadcasters to solidify their plans is contrary to the best interests of the public.

4. **Broadcasters are interested only in using their digital channel to replicate their analog program service. It would be a waste of cable channel capacity to provide a duplicated programming service under a must-carry obligation.**

   - It is factually untrue that broadcasters are not pursuing additional digital services.

   - The Commission itself has imposed simulcasting requirements as serving the public interest because the whole idea of the transition is to replace the existing analog service with a successor digital service. Accordingly, duplication is not only tolerable but also, according to the FCC, in the public interest.

5. **The development of satellite services undercuts cable's market power. Because of the surging growth of DBS, must-carry regulation is no longer necessary.**

   - Congress determined that both cable and DBS act as "gatekeepers" with the ability to deprive broadcasters of access to their audience, resulting in a spiraling loss of viewers and program quality, for subscribers and non-subscribers alike.

   - Without cable carriage, the DTV transition cannot be effectively launched, regardless of whether television stations in the intermediate or long-term may have more bargaining leverage with cable systems over analog retransmission as a consequence of the growth of DBS.

6. **Any must-carry requirement would cause cable subscribers to lose cable services that they currently enjoy. It is inappropriate for government regulation to advantage one set of programmers over another.**

   - This did not happen in the early 1990's, when cable argued that analog must-carry rules would have this same effect. Yet cable capacity was much smaller in relation to the number of broadcast signals than it is today.

- Cable systems are adding capacity dramatically and digitizing rapidly. *See* NAB letter of Feb. 9 citing Time Warner report that it is increasing its digital conversion budget by more than a third and AT&T's statement that its digital capacity is increasing more than exponentially. Presumably, this new capacity is being filled up with cable programming, often from sources in which the cable systems have a financial interest, when it otherwise could be used to accommodate digital broadcast signals.

- Broadcasters have repeatedly stated that they are willing to help craft digital must-carry rules that would minimize temporary disruption to subscribers of cable systems that will have capacity problems.

7. **The 1997 Budget Act set an 85% threshold for the give-back of analog channels. Since cable subscribership is only about 70%, a digital must-carry requirement would be insufficient and therefore unnecessary.**

   - Reaching the 70% of America's homes served by cable, it is true, would not drive DTV penetration through to the Congressionally-mandated threshold of 85%. But without access to cable's 70% subscriber base, broadcasters won't remotely approach the 85% threshold. Cable's argument is absurd.

8. **The record contains insufficient evidence to impose a digital must-carry requirement.**

   - We know of no salient issue as to which wholly-sufficient information has not been provided.

   - The 1992 Act's digital carriage requirement was built on the conclusive Congressional record supporting analog must-carry. The need for analog must-carry was less compelling than the need for digital must-carry.

   - The courts have repeatedly upheld Commission actions that are based on reasonable predictions. Given the analog must-carry experience and the course of retransmission consent negotiations, there would be even greater reason to accept the Commission's prediction in the case of digital must-carry.

   - With only two systems carrying a DTV signal out of the 119 on the air, we can hardly imagine a stronger record of harm to both broadcasters and the entire public.

   - If the Commission needed additional information, it should have asked for it long ago, as it has in other proceedings.

9. **Wall Street has said that the digital transition will be powered by cable systems' delivery of digital services which, in turn, will induce consumers to purchase digital sets. Therefore, a digital must-carry requirement is unnecessary.**

   - The FCC's ex parte notifications and the record more generally fail to reflect any evidence of Wall Street's views on must-carry.

   - If this information were put on the record, it might be shown to come from analysts beholden to the cable industry, and more objective analysts would have a different viewpoint.

   - Moreover, CBO has made it clear that the digital transition will not succeed without carriage requirements, and that is a matter of record.

   - If consumers buy digital sets to watch digital cable programming, then cable operators as natural and historic foes of broadcasters will have every incentive to continue denying digital television broadcast signals access to subscriber homes (an incentive that increases with vertical integration).

   - Allowing cable to limit the reach of DTV stations, whether as an initial or permanent matter gives cable the opportunity to build an audience for its digital services and only then, once it has captured the digital market, risk carrying broadcast content.

10. **Failure to adopt digital carriage rules will not harm the public.**

   - The digital transition enables the country's local, free and universal television service, which commands 60% of even cable subscribers audiences, to avoid being stranded on the wrong side of the digital divide.

   - The transition opens to all of the American public the opportunity to enjoy innovative services that only technology digital makes possible.

   - Cable has demonstrated, with the undisguised arrogance of the entrenched gatekeeper, that it will deny carriage of digital broadcast signals even when, as indicated in the testimony of an AT&T witness before the FCC, cable will be in search of program material to occupy its rapidly expanding capacity.

   - With cable's subscribership at 70%, there is no conceivable way that the transition can reach critical mass, let alone be completed, without cable carriage. CBO agrees.

   - The case for carriage rules could not be more compelling.